MOHD AMIN MOHD RAZALI & ORS

v.

PP & ANOTHER APPEAL

FEDERAL COURT, KUALA LUMPUR
AHMAD FAIRUZ CJ (MALAYA)
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL MALEK AHMAD FCJ
SITI NORMA YAAKOB FCJ
HAIDAR MOHD NOOR FCJ
[CRIMINAL APPEAL NO: 05-(02-20)-2002(W)]
26 JUNE 2003

CRIMINAL PROCEDURE: *Trial - Security case - Standard of proof - Whether as prescribed in specific Regulations therefor - Trial judge applying normal rules of evidence in Criminal Procedure Code - Whether fatal - Whether trial a nullity - Essential (Security Cases) Regulations 1975, regs. 13, 17 - Penal Code, ss. 121, 122 - Criminal Procedure Code, s. 182A*

CRIMINAL PROCEDURE: *Sentence - Adequacy - Security offence - Waging war against Yang di Pertuan Agong - Appropriate sentence - Essential (Security Cases) Regulations 1975, regs. 13, 17 - Penal Code, ss. 121, 122*

STATUTORY INTERPRETATION: *Construction of statutes - Security legislation - Essential (Security Cases) Regulations 1975 - Whether a specific legislation - Rules of evidence therein - Side stepping of prima facie rule - Whether applicable to security cases - Whether to override rules in Criminal Procedure Code - Essential (Security Cases) Regulations 1975, regs. 13, 17*

The appellants were convicted of an offence under s. 121 of the Penal Code ('the Code') for waging war against the Yang di-Pertuan Agong. The evidence as adduced showed that the appellants, as members of an outlawed group called Al-Maunah, had sought to overthrow the Government of the day by force and violence and to that end, had: (i) staged arms heist and seized caches of weapons belonging to the army; (ii) set up base camp at Bukit Jenalik, Perak where they took two police personnel, a civilian and an army trooper as hostages and subsequently killed the trooper; (iii) bombed two breweries and a temple in Selangor; and (iv) caused damage to an electrical power cable in Perak.

In these appeals and cross appeals against the respective sentences imposed, namely the sentence of death against the 1st, 2nd and 3rd appellants and of life imprisonment against the 4th to the 19th appellants, arguments were put forth that the trial below was a nullity, as the learned judge had failed to apply the rules of evidence as laid out in the Essential (Security Cases) Regulations 1975 ('ESCAR'), particularly that of its regs. 13 and 17 which mandated the court to hear the defence before deciding on the guilt or innocence of the accused, notwithstanding that a certificate under reg. 2(2) of ESCAR had been issued by the Public Prosecutor certifying the case as a security case. It was further argued that the imposition of the death sentence was inappropriate, considering that a conviction under s. 121 of the Code has never before been recorded in Malaysia.

The facts showed however that the learned judge, in preferring the normal rules of evidence in the Criminal Procedure Code ('CPC') to that of ESCAR's, had only: (i) endorsed the prosecution's decision to take on the heavier burden of proof under the CPC; and (ii) followed the majority decision of the Federal Court in *PP v. Sihabduin Haji Salleh & Anor ('Sihabduin')* in which it was ruled that, at the end of the prosecution case, in an ESCAR proceeding, the court was not entitled to call for the defence unless a *prima facie* case had first been made out. In these circumstances, before the learned judges of the Federal Court herein, questions arose as to: (i) whether the trial below was flawed by the learned judge's failure to strictly apply the rules in ESCAR; (ii) whether the dissenting judgment of Wan Sulaiman FCJ in *Sihabduin* represents the correct view on regs. 13 and 17 of ESCAR and ought to be given effect to; and (iii) whether the sentences as imposed by the learned judge ought to be disturbed.

Held:

Per Ahmad Fairuz CJ (Malaya)

[1] I concur with the conclusions stated in the judgments of my learned brothers Steve Shim Lip Kiong CJ (Sabah & Sarawak) and Abdul Malek Ahmad FCJ and my learned sister Siti Norma Yaakob FCJ, except that, for the part of my learned brother Steve Shim Lip Kiong's judgment on the issue of regs. 13 and 17 of ESCAR, I associate myself with the dissenting judgment in *Sihabduin*'s case for the reasons stated by my learned brother Abdul Malek Ahmad FCJ. (p 436 a)

[2] Except for the cross appeal against the sentence imposed on the 10th appellant, the appeals and the cross appeals must be dismissed. The cross appeal against the sentence of the 10th appellant is allowed and the sentence of life imprisonment is substituted with a sentence of death. (p 436 b)

Per Steve Shim CJ (Sabah & Sarawak)

[1] The omission of the words 'jointly' or 'with common intention' in the charge had not rendered the charge defective. Likewise, the preference of the alternative charge under s. 122 of the Code against some of the accused had not attracted the provisions of art. 8(1) of the Federal Constitution. (p 436 f-g)

[2] Although the learned trial judge had not strictly applied the rules as laid down in ESCAR and had instead conducted the trial in accordance with the rules of practice and procedure as set out in the CPC, this has not occasioned any prejudice or miscarriage of justice. It was indeed a factor much to the benefit of the appellants. (pp 438 h & 439 a)

[3] There is no good reason to depart from the majority view in *PP v. Sihabduin*. There was indeed perfect sense in the observation of Raja Azlan Shah LP in *PP v. Nordin bin Johan*, that justice and fair play has become such a fundamental principle in our adversarial system of trial that it requires much more than the words used in reg. 13 ESCAR to dislodge it. (p 441 c-d)

[4] The learned trial judge was correct in holding that the prosecution had proved the charge under s. 121 of the Code beyond reasonable doubt. The learned trial judge had also taken all relevant factors into consideration and had applied the correct principles in imposing not only the death sentences on 1st, 2nd and 3rd appellants, but also, subject to one exception, the life sentences on the rest of the appellants. (pp 441 f & 442 c)

[4a] The one exception relates to the 5th accused (10th appellant), who, in shooting trooper Matthew in cold blood, had not only showed his total disregard for human life but also the extent of his commitment to the common cause of overthrowing the Government by force and violence. Upon such deliberate act of terror, the public prosecutor's appeal against sentence as regards the 5th accused ought to be allowed and the life sentence imposed on him should be substituted with a death sentence. (pp 442 c-h & 443 a)

Per Abdul Malek Ahmad FCJ

[1] Although ESCAR was not used despite the certificate presented at the outset, the appellants had not been prejudiced by the stance of the prosecution in resorting to the normal rules of procedure and evidence. If at all, the concession is more to the advantage of the appellants. (p 446 e)

[2] Regulation 13 of ESCAR is crystal clear. When the case for the prosecution is closed, the court shall call the accused to enter his defence. Its effect is made clearer when reg. 17 is read, in that the decision on the guilt or innocence of the accused can be made after hearing both the prosecution and the defence. (p 446 f-g)

[2a] Regulations 13 and 17 of ESCAR are specific provisions which override the general provision on this point in the Criminal Procedure Code. That being so, the dissenting judgment in *Sihabduin* appears to be the correct view. Defence must be called in all cases certified under ESCAR. (p 447 h)

[3] Section 34 of the Code can be applied if common intention is established by the evidence on record, notwithstanding that such intention is not reflected in the charge. Such an absence of charge is not by itself fatal unless prejudice is caused to the accused. On the facts, it has not. (p 450 b)

[4] The appeals and cross appeals are dismissed except that the cross appeal against the 10th appellant is allowed and the sentence of life imprisonment imposed on him is substituted with the sentence of death. (p 450 f)

Per Siti Norma Yaakob FCJ

[1] On the issue of regs. 13 and 17 of ESCAR, I agree with my learned brother, Abdul Malek Ahmad FCJ, that, in view of the clear and unambigious provisions of the two regulations, the dissenting judgment in *Sihabduin* must prevail. (p 450 g-h)

[2] Whilst it is true that the 1st appellant was convicted of an offence for which nobody has been convicted before, the trend must be nipped in the bud. Public interest demands that even in the rarest of such cases, life imprisonment would not be an adequate remedy. There is thus no reason to disturb the exercise of the judge's discretion as regards sentence and the sentence of death pronounced on 1st appellant is confirmed. (p 455 b)

[2a] The 2nd appellant was the second in command after the 1st appellant. As the 1st appellant's right hand man, he must have known about the plan to topple the legitimate Government of the day. His deep involvement and active participation therein must have convinced the learned judge to impose the maximum sentence and I have no reason to disagree on that finding. (pp 455 d-h & 456 a)

[2b] The 3rd appellant, as a serving military officer with the Malaysian Armed Forces holding the rank of a Major at the material time, was a self-confessed traitor. With the seized weapons he had taught the others in the group to use them, and as Chief of Al-Maunah's Northern Zone, he was much in control of the situation at Bukit Jenalik. It was his act of betrayal and disloyalty that had convinced the learned judge to prefer the maximum sentence. I endorse that finding. (p 456 b-c)

[3] The learned judge has rightly considered the less than dominant roles played by the 4th to the 19th appellants and, except for one, there is no reason to disturb the sentences imposed. The exception is the 10th appellant who showed no qualm about shooting trooper Matthew in cold blood when ordered to do so by the 1st appellant. It is this one single act of brutal violence that singles him out as demonstrating the extent to which he was capable of doing so as to meet the illegal objectives of Al-Maunah. The sentence of life imprisonment handed to the 10th appellant was inadequate and ought to be substituted with the sentence of death. (p 460 b-c)

Per Haidar Mohd Noor FCJ

[1] Abdul Malek Ahmad FCJ took the view that regs. 13 and 17 of ESCAR are specific provisions which override the general provision on the *prima facie* case in the Criminal Procedure Code and preferred the dissenting judgment in *Sihabduin*. Likewise Siti Norma Yaakob FCJ took the same view preferring to adopt the dissenting view in *Sihabduin*. I would respectfully agree with their views and would conclude that, in respect of security cases under ESCAR, the burden of proof imposed on the prosecution is a departure from the ordinary criminal cases provided by s. 182A of the Criminal Procedure Code. (pp 461 e-h & 462 a)

[2] As for the substitution of the sentence of life imprisonment in respect of the 10th appellant to one of sentence of death by the learned Chief Judge, Sabah & Sarawak, I agree with it for the reasons stated. And I agree that the appeals by the 1st, 2nd and 3rd appellants against their sentences

of death be dismissed and the appeals by the public prosecutor against the sentences of life imprisonment in respect of 4th to the 9th appellants and the 11th to the 19th appellants be also dismissed. (p 462 b)

[Appeals and cross appeals dismissed except for cross appeal against sentence imposed on 10th appellant, wherefore sentence of life imprisonment thereof substituted with death sentence.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu-perayu telah disabitkan dengan kesalahan di bawah s. 121 Kanun Keseksaan ('Kanun') kerana melancarkan perang terhadap Yang Di- Pertuan Agong. Keterangan seperti yang dikemukakan menunjukkan bahawa perayu, selaku anggota satu kumpulan haram yang dipanggil Al-Maunah, berhasrat untuk menjatuhkan Kerajaan yang memerintah melalui paksaan dan kekerasan, dan bagi mencapai matlamat tersebut, telah: (i) merompak dan merampas berbagai senjata milik tentera; (ii) mendirikan kem di Bukit Jenalik, Perak di mana mereka mengambil 2 anggota polis, seorang awam dan seorang anggota tentera sebagai tebusan, dan kemudian membunuh anggota tentera tersebut; (iii) mengebom dua kilang arak dan sebuah kuil di Selangor; dan (iv) merosakkan kabel eletrik di Perak.

Dalam rayuan-rayuan dan rayuan-rayuan balas terhadap hukuman yang dijatuhkan, yakni hukuman mati ke atas perayu-perayu 1, 2 dan 3 dan hukuman penjara seumur hidup ke atas perayu-perayu 4 hingga ke 19, penghujahan telah dibuat bahawa perbicaraan di bawah adalah batal, oleh kerana hakim yang bijaksana telah gagal menggunapakai kaedah-kaedah keterangan seperti yang termaktub dalam Peraturan-Peraturan Perlu (Kes-kes Keselamatan) 1975 ('ESCAR'), terutama per-per. 13 and 17 di situ yang mewajibkan mahkamah mendengar pembelaan sebelum memutuskan tentang kebersalahan tertuduh, walaupun sijil di bawah per. 2(2) ESCAR telah dikemukakan oleh PP mengesahkan bahawa kes semasa adalah satu kes keselamatan. Dihujahkan lagi bahawa pengenaan hukuman mati adalah tidak wajar, oleh kerana sabitan di bawah s. 121 Kanun tidak pernah direkodkan di Malaysia sebelum ini.

Fakta bagaimanapun menunjukkan bahawa, hakim yang bijaksana, dalam menerimapakai kaedah-kaedah keterangan di bawah Kanun Prosedur Jenayah ('KPJ'), dan menolak kaedah-kaedah ESCAR, hanyalah: (i) menyetujui keputusan pendakwa untuk menanggung beban bukti yang lebih berat di bawah KPJ; dan (ii) menuruti keputusan majoriti Mahkamah Persekututan dalam *PP v. Sihabduin bin Haji Salleh & Anor ('Sihabduin')* yang memutuskan bahawa, di akhir kes pendakwaan, dalam suatu prosiding ESCAR, mahkamah tidak

berhak untuk memanggil pembelaan kecuali jika suatu kes *prima facie* telah terlebih dahulu dibuktikan. Dalam halkeadaan sedemikian, di hadapan hakim-hakim Mahkamah Persekutuan yang bijaksana di sini, persoalan-persoalan telah berbangkit berhubung: (i) sama ada perbicaraan di bawah menjadi cacat akibat dari kegagalan hakim bicara untuk menggunapakai dengan ketatnya peraturan-peraturan di bawah ESCAR; (ii) sama ada penghakiman menentang Wan Sulaiman HMP dalam *Sihabduin* mencerminkan pandangan yang betul berhubung per-per. 13 and 17 ESCAR dan oleh itu harus diberikan kesannya; dan (iii) sama ada hukuman-hukuman seperti yang dijatuhkan oleh hakim yang bijaksana perlu diubah.

Oleh Ahmad Fairuz KH (Malaya)

[1] Saya bersetuju dengan rumusan-rumusan yang dibuat dalam penghakiman hakim yang bijaksana Steve Shim Lip Kiong KH (Sabah dan Sarawak), Abdul Malek Ahmad HMP dan Siti Norma Yaakob HMP, kecuali, bersangkutan dengan bahagian dalam penghakiman Steve Shim Lip Kiong yang menyentuh isu per-per. 13 dan 17 ESCAR, saya bersependapat dengan penghakiman menentang dalam kes *Sihabduin* atas alasan yang diberikan oleh saudara saya yang bijaksana Abdul Malek Ahmad HMP.

[2] Kecuali bagi rayuan balas terhadap hukuman yang dijatuhkan ke atas perayu 10, rayuan-rayuan dan rayuan-rayuan balas harus ditolak. Rayuan balas terhadap hukuman ke atas perayu 10 dibenarkan dan hukuman pemenjaraan seumur hidup yang dijatuhkan ke atasnya diganti dengan hukuman mati.

Oleh Steve Shim KH (Sabah & Sarawak)

[1] Peninggalan perkataan ‘secara bersama’ atau ‘dengan niat bersama’ dalam pertuduhan tidak menjadikan pertuduhan tersebut cacat. Begitu juga, mengenakan pertuduhan di bawah s. 122 hanya kepada sebahagian tertuduh tidak menarik pembabitan fasal 8(1) Perlembagaan Persekutuan.

[2] Walaupun hakim yang bijaksana tidak menggunapakai dengan ketatnya kaedah-kaedah ESCAR, dan malahan telah mengendalikan perbicaraan dengan berpandukan kaedah-kaedah KPJ, ianya tidak menyebabkan apa-apa prejudis atau salah laksana keadilan. Ia malah adalah satu faktor yang memanfaatkan perayu-perayu.

[3] Tidak ada alasan yang kuat untuk menyimpang dari pandangan majoriti dalam *Sihabduin*. Raja Azlan Shah KH dalam *PP v. Nordin bin Johar* telah menyatakan sesuatu yang amat wajar apabila beliau berkata bahawa nilai-nilai keadilan dan kesaksamaan sudah menjadi prinsip penting dalam sistem perbicaraan adversarial kita, dan kerana itu memerlukan sesuatu yang lebih dari perkataan-perkataan dalam per. 13 ESCAR untuk merubahkannya.

[4] Hakim yang bijaksana adalah betul dalam rumusannya bahawa pendakwa telah membuktikan kes di bawah s. 121 Kanun di luar keraguan munasabah. Hakim yang bijaksana juga telah mempertimbang semua faktor relevan serta telah menggunapakai prinsip yang betul dalam menjatuhkan bukan sahaja hukuman mati terhadap perayu-perayu 1, 2 dan 3 tetapi juga, kecuali terhadap satu perayu, hukuman-hukuman pemenjaraan seumur hidup terhadap perayu-perayu yang lain.

[4a] Satu kecualian tersebut adalah terhadap tertuduh ke 5 (perayu ke 10) yang, dalam menembak trooper Matthew, tidak sahaja mencerminkan ketandusan hormatnya kepada nyawa manusia tetapi juga tahap komitmennya terhadap cita-cita bersama mereka untuk menjatuhkan Kerajaan melalui paksaan dan kekerasan. Mengambilkira perbuatan ganasnya itu, rayuan Pendakwa Raya terhadap tertuduh ke 5 harus dibenarkan, dan hukuman pemenjaraan seumur hidup yang dijatuhkan ke atasnya harus diganti dengan hukuman mati.

Oleh Abdul Malek Ahmad HMP

[1] Walaupun ESCAR tidak dipakai sekalipun sijil mengenainya dikemukakan awal-awal lagi, namun, keputusan pendakwa untuk menggunapakai kaedah-kaedah prosedur dan keterangan biasa tidak langsung menjejaskan perayu-perayu. Jikapun ada kesannya, ia memihak kepada perayu-perayu.

[2] Peraturan 13 ESCAR adalah jelas. Apabila pendakwa menutup kesnya mahkamah harus memanggil tertuduh untuk membela diri. Kesannya menjadi semakin terserlah dengan membaca per. 17, yang memperuntukkan bahawa keputusan mengenai kebersalahan atau ketidakbersalahan tertuduh hanya boleh dibuat setelah mendengar kedua-dua pendakwaan dan pembelaan.

[2a] Peraturan-peraturan 13 dan 17 ESCAR adalah peruntukan khas yang mengatasi peruntukan am berkenaannya dalam KPJ. Dengan yang demikian, penghakiman menentang dalam *Sihabduin* nampaknya telah mempamerkan pandangan yang betul. Pembelaan mestilah dipanggil dalam semua kes yang dibicarakan di bawah ESCAR.

[3] Seksyen 34 Kanun masih boleh dipakai jika keterangan pada rekod menunjukkan wujud niat bersama, walaupun niat tersebut tidak dinyatakan dalam pertuduhan. Ketiadaan tuduhan sedemikian secara sendirian tidaklah memudaratkan, kecuali tertuduh telah diprejudis olehnya. Di atas fakta, tertuduh tidak diprejudis.

[4] Rayuan-rayuan dan rayuan balas ditolak, kecuali rayuan balas terhadap hukuman yang dijatuhkan ke atas perayu ke 10 dibenarkan dan hukuman ke atasnya diganti dengan hukuman mati.

Oleh Siti Norma Yaakob HMP

[1] Berhubung isu per-per. 13 dan 17 ESCAR, saya bersetuju dengan saudara saya yang bijaksana Abdul Malek Ahmad HMP bahawa, mengambilkira perkataan-perkataan jelas dalam kedua-dua peruntukan itu, pandangan penghakiman menentang dalam *Sihabduin* harus diterimapakai.

[2] Sementara ianya benar bahawa perayu pertama telah disabitkan dengan kesalahan yang mana tiada seorang pun pernah disabitkan sebelum ini, kecenderungan melakukannya perlu dihalang seawal mungkin. Kepentingan awam juga menuntut bahawa bagi kesalahan seperti ini, walau sejarang mana sekalipun ia berlaku, hukuman pemenjaraan seumur hidup adalah tidak memadai. Jelas bahawa tiada alasan untuk mengganggu penggunaan budibicara oleh hakim bicara mengenai hukuman, dan oleh yang demikian hukuman mati yang dijatuhkan terhadap perayu pertama adalah dikekalkan.

[2a] Perayu kedua merupakan orang kedua terpenting selepas perayu pertama. Sebagai orang terkanan perayu pertama, beliau semestinya menyedari tentang rancangan untuk menjatuhkan Kerajaan memerintah yang sah. Penglibatannya yang mendalam dan aktif dalam rancangan tersebut menyakinkan hakim yang bijaksana untuk menjatuhkan hukuman maksima ke atasnya dan saya tiada alasan untuk tidak bersetuju dengan hukuman tersebut.

[2b] Perayu ketiga, yang merupakan seorang pegawai tentera berpangkat Major dalam Angkatan Tentera Malaysia sewaktu kejadian, adalah seorang penderhaka. Dengan senjata-senjata yang dirampas, beliau telah mengajar ahli-ahli lain cara-cara menggunakan senjata tersebut, dan selaku Ketua Al-Maunah Zon Utara, beliau amat menguasai keadaan di Bukit Jenalik. Kederhakaan dan ketidaksetiaannya telah menyakinkan hakim bijaksana untuk menjatuhkan hukuman maksima terhadapnya. Saya mengesahkan hukuman tersebut.

[3] Hakim yang bijaksana telah dengan betulnya menimbang peranan kurang menonjol yang dimainkan oleh perayu-perayu ke 4 hingga ke 19, dan kecuali hukuman ke atas seorang, tiada alasan untuk mengganggu hukuman-hukuman tersebut. Kecualian adalah berhubung perayu ke 10 yang tidak teragak-agak menembak trooper Matthew yang tiada upaya untuk melawan apabila disuruh berbuat demikian oleh perayu pertama. Tindakan ganasnya inilah yang membezakan dirinya dalam ertikata menunjukkan sejauh mana ia sanggup berbuat untuk memenuhi cita-cita Al-Maunah. Hukuman ke atas perayu ke 10 adalah tidak memadai dan harus diganti dengan satu hukuman mati.

Oleh Haidar Mohd Noor HMP

[1] Hakim Abdul Malek Ahmad HMP mengambil pendekatan bahawa per-per. 13 dan 17 ESCAR adalah peruntukan spesifik yang mengatasi peruntukan am berkenaan kes *prima facie* dalam KPJ dan seterusnya memilih menerimapakai penghakiman menentang dalam *Sihabduin*. Seterusnya, hakim Siti Norma Yaakob HMP mempunyai pendapat serupa dan memilih menggunapakai penghakiman menentang dalam *Sihabduin*. Dengan hormat saya bersetuju dengan pandangan mereka dan merumuskan bahawa, beban bukti yang dipikul oleh pendakwaan dalam kes-kes ESCAR adalah berlainan dan menyimpang dari kes-kes jenayah biasa seperti yang diperuntukkan oleh s. 182A KPJ.

[2] Berhubung penggantian hukuman penjara seumur hidup yang dijatuhkan ke atas perayu ke 10 dengan hukuman mati oleh yang arif Hakim Besar (Sabah & Sarawak), saya bersetuju dengannya atas alasan-alasan yang diberi. Dan saya juga bersetuju bahawa rayuan perayu-perayu pertama, kedua dan ketiga terhadap hukuman mati yang dijatuhkan ke atas mereka ditolak, sepertimana halnya juga dengan rayuan-rayuan balas PP terhadap hukuman penjara seumur hidup yang dijatuhkan ke atas perayu-perayu ke 4 hingga ke 9 serta perayu-perayu ke 11 hingga ke 19.

Rayuan dan rayuan-rayuan balas ditolak kecuali rayuan balas terhadap perayu ke 10 di mana rayuan tersebut dibenarkan dan hukuman yang dikenakan ke atasnya diganti dengan hukuman mati.]

Case(s) referred to:
Aung Hla & Ors v. Emperor (AIR) [1931] Rangoon 235 ***(refd)***
Chandrasekaran & Ors v. PP [1971] 1 MLJ 153 ***(refd)***
Leith McDonald Ratten v. The Queen [1972] AC 378 (PC) ***(refd)***
Md Desa Hashim v. PP [1995] 4 CLJ 677 FC ***(refd)***
Muhamad Safarudin Baba & Anor v. PP [2002] 4 CLJ 210 CA ***(refd)***
PP v. Muhamad Nasir Shaharuddin & Anor [1994] 2 MLJ 576 HC ***(refd)***
PP v. Nordin Johan & Anor [1983] 2 CLJ 22; [1983] CLJ (Rep) 345 FC ***(refd)***
PP v. Sihabduin Hj Salleh & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 FC ***(refd)***
Subramaniam v. PP [1956] 22 MLJ 220 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 170, 182A
Dangerous Drugs Act 1952, ss. 6, 37(d), (da), 39A(2)
Essential (Security Cases) (Amendment) Regulations 1975, regs. 2(2), 3(1), 13, 17, 21(1), (3)
Evidence Act 1950, s. 2
Federal Constitution, arts. 5(1), 8(1)
Penal Code, ss. 34, 121, 122, 130A(b)

Other source(s) referred to:
Ratanlal and Dhirajlal's Law of Crimes, 25th edn, p 103

For the 1st appellant - Karpal Singh (Jagdeep Singh Deo); M/s Karpal Singh & Co
For 2nd & 3rd appellants - Hasnal Rezua Merican (Mohd Yusmadi Mohd Yusoff); M/s Zabidi & Co
For 4th, 7th, 8th, 14th, 15th & 19th appellants and cross respondents - Surina Suhaimi (Hasnal Rezua Merican & Mohd Yusmadi Mohd Yusoff); M/s Zabidi & Co
For 5th, 6th & 13th appellants and cross respondents - Zainal Ithnin (Jalaludin Ismail & Shahruddin Osman); M/s Zainal Ithnin & Partners
For 9th, 11th, 16th, 17th & 18th appellants and cross respondents - Mohamed Hanipa Maidin (Zaini Zainal & Zulqarnain Lukman); M/s Mohamed Hanipa & Associates
For 10th & 12th appellants and cross respondents - Zamani Ibrahim (Mohd Hanif Idris, Faiz Fadzil & Leong Pak Yiew); M/s Zamani Ibrahim, Tarmizan & Co
For the respondent and cross appellant - Abdul Gani Patail (Mohd Yusof Hj Zainal Abiden, Abdul Majid Hamzah, Abdul Halim Aman, Salehuddin Saidin & Harith Sham) A-G's Chambers

Reported by WA Sharif

JUDGMENT

Ahmad Fairuz CJ (Malaya):

I have read the judgments of my learned brothers Steve Shim Lip Kiong, CJ (Sabah & Sarawak) and Abdul Malek Ahmad FCJ, and my learned sister Siti Norma Yaakob, FCJ, and I concur with the reason and conclusions stated therein except for the part of my learned brother Steve Shim Lip Kiong's judgments on the issue of regs. 13 and 17 of ESCAR. For the reason stated by my learned brother Abdul Malek Ahmad, I associate myself with the dissenting judgment in *Sihabduin*'s case.

Accordingly, I agree that the appeals of all the nineteen appellants must be dismissed. Except for the cross appeal against the sentence of the 10th appellant, the cross appeal by the public prosecutor is also dismissed. The cross appeal against the sentence of the 10th appellant is allowed and the sentence of life imprisonment is substituted with the sentence of death.

Steve Shim CJ (Sabah & Sarawak):

Background

Twenty-nine accused were initially charged with the offence of waging war against the Yang di-Pertuan Agong under s. 121 of the Penal Code. In the midst of the prosecution case the learned public prosecutor decided to charge 14 of the accused under s. 122. Ten of them pleaded guilty to the said charge. They were each sentenced to a term of 10 years imprisonment. The prosecution proceeded against the remaining 19 accused under s. 121 of the Penal Code. After a lengthy trial, they were convicted under the said s. 121. Accused 1, 2 and 3 were sentenced to death while the remaining 16 were each sentenced to life imprisonment. They have all filed their appeals against conviction and sentence. The learned public prosecutor has counter-appealed against the sentence of life imprisonment imposed on each of the 16 accused.

The Law

At the outset, the learned trial Judge addressed himself on the relevant law. Here, he touched on the ingredients necessary to sustain the charge under s. 121 of the Penal Code. He stated, quite correctly, that there were two essential ingredients involved, to wit, that the accused had waged war and that such war was against the Yang di-Pertuan Agong. He cited in support various passages from *Ratanlal & Dhirajlal's Law Of Crimes* as well as *Archbold*, which, in the main, explained the scope of s. 121. It was stated that the true criterion of the offence was the purpose or intention with which the gathering assembled; that the object of the gathering must be to attain, by force and violence, an object of a general public nature thereby striking directly against

the authority of the Government. The learned trial judge also relied on a number of case authorities. The observation in one of them bears repetition herein. In *Aung Hla & Ors v. Emperor (Air)* [1931] *Rangoon* 235, the court said:

> The words 'waging war' in S.121 are synonymous with levying war in statute 25, Edward 3, C. 2, and where a multitude rises and assembles to attain by force and violence any object of general public nature, it amounts to waging war against the Majesty of the King. It is not the number or the forces but purpose and the intention which congregates and assembles them together and gives the impulse in arming and rising that constitutes the crime and distinguishes it from riot or any other rising for any private purpose. There is further no distinction between principal and accessory and all who take part in the treasonable act incur the same guilt and are liable to the same punishment.

In turn, the court in that case cited with approval the observation of Holt LCJ in *Sir John Friend* who said:

> If persons do assemble themselves and act with force in opposition to some law which they think inconvenient and hope thereby to get it repealed, this is a levying war and treason ... The question always is whether the intent is, by force and violence, to attain an object of a general and public nature by any instruments or by dint of their numbers. Whoever incites, advises, encourages or is in any way aiding to such a multitude so assembled with such intent, though he does not personally appear among them or with his own hands, commit any violence whatsoever, yet he is equally a principal with those who act and guilty of high treason.

Evaluation Of Evidence

It is in the light of the relevant law and legal principles aforesaid that the learned trial judge proceeded to deal with the issues raised by the defence. Prominent among these were (a) whether the omission of the words "jointly" or "with common intention" in the charge had rendered it defective in law and (b) whether the alternative charge under s. 122 of the Penal Code against some of the accused had attracted the provisions of art. 8(1) of the Federal Constitution. After discussing the issues at some length, the learned trial judge came to a negative conclusion on both counts. I find no reason to disturb those conclusions. There are no errors involved.

Thereafter, the learned trial judge proceeded to address himself on two aspects of the prosecution case, namely, the preparation to wage war by the accused and the act of waging war against the proper authorities. In considering the element of preparation, he alluded to evidence which established the following facts: the purchase of army uniforms; the acquisition of three Pajero vehicles; the renting of a house; the purchase and collection of swords called "parang

kembar"; the illegal seizure of military weapons at Post 2, Kuala Rhui Camp and at Batalion 304, Kern Grik; the recovery of military weapons and equipment at Bukit Jenalik by the security forces. The learned trial judge concluded that all those acts were aimed at challenging or destabilizing the authority of the Government and establishing a so-called "Islamic State". As regards the element of waging war, the learned trial judge touched on evidence relating to the torture and killing of two hostages at Bukit Jenalik; the attack on members of the security forces by the accused; the various types of weapons seized at Bukit Jenalik where all the accused were holed up; the separate but orchestrated attacks at various places in Petaling Jaya, Shah Alam and Batu Caves including the shooting of the cable tower and installations belonging to Tenaga Nasional Berhad (TNB) at Lata Kekabu. He took the view that all these factors demonstrated the clear commitment and intention of the accused in challenging the authority of the Government. At the end of the prosecution case, he came to this conclusion:

> Having regard to the totality of the evidence adduced by the prosecution and after having considered carefully the submission of learned counsel for all the accused and the prosecution, I am satisfied at the close of the prosecution case that the prosecution has made out a prima facie case against all the accused. It is my finding that the prosecution has proven the essential ingredients of the charge against all the accused for the offence under section 121 of the Penal Code. I thereby ordered all the nineteen accused to enter their defence on the charge framed against them.

Essential (Security Cases) (Amendment) Regulations 1975

At this point I should perhaps draw attention to the fact that the learned public prosecutor had, on 8 August 2000, issued out a certificate pursuant to the Essential (Security Cases) (Amendment) Regulations 1975 (ESCAR), in effect classifying the offence with which the accused were charged as a security offence. Quite conceivably this had brought into play the provisions of ESCAR, in particular reg. 2(2) thereof which stipulates:

> (2) Where the commission of any offence against any written law other than sections 57, 58, 59, 60, 61 and 62 of the Internal Security Act, 1960, in the opinion of the Attorney-General, affects the security of the Federation, he shall issue a certificate to that effect and **the case shall thereupon be dealt with and tried in accordance with these Regulations**.

Given the *ex facie* mandatory nature of that part of the regulation underscored above, we thought it appropriate to hear further submission from counsel on the point. Having heard their submissions, I take the view that although the rules laid down in ESCAR were not strictly applied, it had caused no prejudice

to the accused whatsoever. In conducting the trial in accordance with the rules of practice and procedure set out in the Criminal Procedure Code, there was no miscarriage of justice caused. Indeed, in doing so, it was in effect more to the benefit of the accused.

In any event, reg. 3(1) ESCAR is significant. It reads:

> These regulations shall have effect with respect to security cases notwithstanding anything to the contrary contained in any written law; but, except in so far as the same are varied by these Regulations, the ordinary practice and procedure, where appropriate, shall apply to security cases.

Reading the judgment as a whole, it seems clear that the learned trial judge had also side-stepped the rules of evidence provided in ESCAR. This is apparent, for example, in relation to the transcripts marked as exhs. P151 and PI52 which were alleged to contain hearsay evidence incriminating the accused. Here, the learned trial judge had applied the normal rules of evidence. For he said at p. 68 of his judgment:

> The law relating to hearsay evidence is that any evidence in the form of hearsay cannot be accepted as evidence and remain inadmissible if admitted.

He then cited with approval the following cases: *Subramaniam v. Public Prosecutor* [1956] 22 MLJ 220; *Chandrasekaran & Ors v. Public Prosecutor* [1971] 1 MLJ 153; and *Leith McDonald Ratten v. The Queen* [1972] AC 378 (PC). All these cases dealt with non-security offences. In security offences, reg. 21(1) ESCAR would have applied in the context of hearsay evidence, in particular that part of the provision which states as follows:

> (1) A statement made by the accused whether orally or in writing to any person shall be admissible in evidence notwithstanding that such statement:
>
> ...
>
> (f) would incriminate the accused; or
>
> (g) contains an admission or confession of guilt, or amounts to an admission or confession of guilt; or
>
> ...
>
> (3) Secondary documentary evidence shall be admissible and hearsay evidence ... may at the discretion of the court be admitted.

Quite clearly, the normal hearsay rule does not apply to reg. 21(1) above. Had the learned trial judge taken into consideration and applied the said provision, he would have little difficulty in admitting exhs. P151 and P152. The fact that he did not do so but had instead applied the normal hearsay rule, was a factor

much to the benefit of the defence. There could be no prejudice and hence no miscarriage of justice involved in so far as the accused were concerned. In short, it can be said that notwithstanding the omission (whether deliberate or otherwise) of the learned trial judge to apply the more draconian provisions of ESCAR, the accused had had a fair trial in the High Court.

Prima Facie Case

Now, in holding that the prosecution had established a *prima facie* case against the accused at the end of the prosecution case, the learned trial judge had apparently applied the principle enunciated by the Federal Court in *Public Prosecutor v. Sihabduin bin Hj. Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82 wherein it was held that in a security case, the court was not entitled to call on the defence unless the prosecution had established a *prima facie* case against him. In this connection, the learned public prosecutor who is also the Attorney-General, had urged us to revisit *Public Prosecutor v. Sihabduin bin Hj. Salleh & Anor (supra)* on account of reg. 13 ESCAR which states:

> When the case for the prosecution is closed, the court shall call on the accused to enter his defence.

It was argued that the words in reg. 13 were clear and unambiguous. As such, he implored us to adopt the dissenting view of Wan Suleiman, FJ in the above case who said:

> Can there be more manifest indication of the intention of Parliament to modify, in favour of the prosecution, the pre-existing state of criminal procedure in cases coming within the regulations? The words of Lord Diplock in an authority cited by my Lord President, *Duport Steels Ltd v. Sirs* [1980] 1 All ER 529 seem to me to be particularly apt, for the "role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.

Wan Suleiman FJ took the view that reg. 13 read with reg. 17 made it clear that the call to enter the defence must be made in any event – that in effect the *prima facie* principle had no application in such a case. It is interesting to note that this call to jettison *Public Prosecutor v. Sihabduin* is not a novel one. The public prosecutor had previously raised the issue in *Public Prosecutor v. Nordin bin Johan & Anor* [1983] 2 CLJ 22; [1983] CLJ (Rep) 345. The Federal Court in that case was however not persuaded. In rejecting the call, Raja Azlan Shah LP said as follows:

> We have been urged by the Public Prosecutor ... to review and disapprove the decision of this court in *Public Prosecutor v. Sihabduin* which held by majority that in a security case, at the end of the prosecution case, the court is not obliged to call on the accused to enter on his defence unless the prosecution has then proved a *prima facie* case against him, and to hold that the provisions of Essential (Security Cases) Regulation, 1975 mandatorily require the defence to be called in every case when the prosecution case is closed ... We do not demur in substance from the view of the law as expressed by Suffian LP. In our opinion, it is supported not only by good sense but by those considerations of justice and fair play as one would expect to find in an adversary system of trial which we practise in this country.

The public prosecutor made another attempt in *Md. Desa bin Hashim v. Public Prosecutor* [1995] 4 CLJ 677. It ended up in naught when the Federal Court reiterated the stand taken in *Public Prosecutor v. Sihabduin.* On a careful consideration of the authorities cited, I find no good reason to depart from the majority view expressed in *Public Prosecutor v. Sihabduin.* In my view, there is perfect sense in the observation of Raja Azlan Shah LP in *Public Prosecutor v. Nordin bin Johan,* that justice and fair play has become such a fundamental principle in our adversarial system of trial that it requires much more than the words used in reg. 13 Escar to dislodge it.

Defence Case

Having held that the prosecution had established a *prima facie* case, the learned trial judge then proceeded to consider the various defences raised. He meticulously examined and considered these defences individually. He came to the conclusion that none of the accused had raised any reasonable doubt in the prosecution's case. I have carefully gone through his evaluation of the evidence adduced by the respective accused. I have no reason to disturb his assessment. He had not erred in law and on the facts. In my view, he was correct in holding that the prosecution had proved the charge under s. 121 of the Penal Code beyond reasonable doubt against all the accused and thereafter convicting them accordingly.

Conclusion

For the reasons stated, I find it appropriate to dismiss the appeals against conviction.

Appeals Against Sentence

I now proceed to deal with the appeals by the 1st, 2nd and 3rd accused against sentence. Each had been sentenced to death by the high court. Encik Karpal Singh, counsel for the 1st accused (Mohd. Amin bin Mohd. Razali) submitted that the learned trial judge had failed to place sufficient consideration on the

fact that the 1st accused was convicted of an uncommon offence of waging war under s. 121 of the Penal Code. He cited some Indian authorities to support the proposition that the death penalty was only imposed in the rarest of rare cases for such offence. Encik Hasnal Merican, counsel for the 2nd and 3rd accused was content to adopt the submission of Encik Karpal Singh. In rebuttal, the learned public prosecutor submitted that the learned trial judge had applied the principles correctly in sentencing the 1st, 2nd and 3rd accused to death. Having perused the grounds given by the learned trial judge, I tend to agree with the view expressed by the learned public prosecutor. Indeed, I would say that the learned trial judge had taken all relevant factors into consideration and had applied the correct principles in imposing not only the death sentences on the 1st, 2nd and 3rd accused but also, subject to one exception, the life sentences on the rest of the accused. The one exception relates to the 5th accused (Jemari bin Yusof). In sentencing him to life imprisonment, the learned trial judge said this:

> For OKT5 (Jemari bin Yusof) whom I have graded into this remaining group of accused, I take the view that although the evidence of this case revealed that he was the person who fired a shot at Trooper Matthew, the army personnel who was detained and killed at Bukit Jenalik, I would still consider that his role could not be equated with the dominant role played by OKT1, OKT2 and OKT3. It is my finding that the action taken by OKT5 in shooting Trooper Matthew was merely under the direction of OKT1 whom he loyally obeyed in the circumstances of the case.

It is not disputed that the 5th accused had killed Trooper Matthew purportedly on the order of the 1st accused. Without doubt, it was an illegal order. He must know that the person he had shot and killed was a member of the police force and an officer of the law. There is evidence that the victim was tortured before he was shot. There is evidence that the victim had pleaded for his life before it was snuffed out of him by the 5th accused. There is evidence that he was shot more than once. The fact that the 5th accused had shot Trooper Matthew in cold blood shows clearly not only his total disregard for human life but also the extent of his commitment to the common cause of overthrowing the Government by force and violence. It seems clear that anyone who stood against their common cause or objective must be got rid off. Given those circumstances, I do not think that he was merely obeying the orders of the 1st accused but had willingly carried out a brutal act with the aim of striking fear at anyone who opposed their common objective of overthrowing the Government by force and violence. It was a deliberate act of terror. Trooper Matthew was executed to serve an illegal purpose – pure and simple.

In my view, the learned trial judge fell into error in not considering all these material factors. If he had, he would have imposed the appropriate sentence of death upon the 5th accused. In the result, I would allow the learned public prosecutor's appeal against sentence as regards the 5th accused (Jemari bin Yusof). The life sentence imposed on him should be substituted to sentence of death. In respect of the other appeals and counter appeals against sentence, I do not, for the reasons already stated, consider them to have any merit. I therefore dismiss them accordingly.

Abdul Malek Ahmad FCJ:

We heard the earlier submissions on 21, 22 and 29 October 2002 and reserved judgment. However, while discussing the points raised, we unanimously decided that further submissions were necessary as despite the fact that the case had proceeded on an Essential (Security Cases) Regulations 1975 (hereinafter "the ESCAR") certificate by virtue of reg. 2(2) thereof, the earlier submissions had centred on the normal rules of procedure and evidence and no mention had been made on the effect of the ESCAR. The further submissions were heard on 22 January 2003.

Karpal Singh acted for the first appellant who had been sentenced to death. In the course of the earlier submissions, he had appealed only against the sentence. He submitted that this was the first case of its kind but where there is a choice of sentence between death and life imprisonment, the court ought to opt for the lower sentence. He conceded that the first appellant, now aged thirty and a first offender, was the mastermind but contended that the waging of war was only against the Yang di-Pertuan Agong and the arms heist and the assembly at Bukit Jenalik were the only action the group had taken. He added that the police and the military should have cordoned off the Bukit Jenalik area and deprived the appellants of food and drink to weed them out and prevent any further action by them. He concluded that the killings of two people at Bukit Jenalik should not in any way obscure the facts.

In the further submissions, however, he pointed us to p. 13 of the grounds of judgment of the learned High Court judge where the learned trial judge had stated:

> **The Burden of Proof At The Close Of The Prosecution Case**
>
> Notwithstanding the fact that all the nineteen accused persons had been tried in accordance with the Essential (Security Cases) Regulations 1975 and that regulation 13 of the said Regulation states that when the case for the prosecution is closed, the Court shall call on the accused to enter on his defence, this Court is still bound by the majority decision of the Federal Court

in the case of *Public Prosecutor v. Sihabduin bin Haji Salleh v. Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82 wherein it was held that in a security case at the end of the prosecution case the Court is not obliged to call on the accused to enter on his defence unless the prosecution has then proved a *prima facie* case against him.

He accordingly referred to the case of *Public Prosecutor v. Sihabduin bin Haji Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82 where a five member panel of this court with a 4-1 majority had held that at the end of the prosecution case in an ESCAR proceeding, the court is not obliged to call on the accused to enter on his defence unless the prosecution has then proved a *prima facie* case against him. This was followed three years later in another ESCAR case by a three member panel of this court in *Public Prosecutor v. Nordin bin Johan & Anor*. [1983] 2 CLJ 22; [1983] CLJ (Rep) 345.

Again, in *Md Desa bin Hashim v. Public Prosecutor* [1995] 4 CLJ 677, this court ruled that although a submission of no case to answer was not made at the close of the prosecution case, it is the duty of the court to intervene and set right any miscarriage of justice that may have resulted in consequence. It further held that in that appeal, the trial judge should not have called upon the appellant to make his defence but should have acquitted him upon both charges at the close of the prosecution case despite the language of reg. 13 of the ESCAR which reads:

13. Procedure after conclusion of case for prosecution.

When the case for the prosecution is closed, the court shall call on the accused to enter on his defence.

In line with these three decisions, learned counsel also referred to a number of other authorities which deal with the test of "a *prima facie* case" or the test of "beyond reasonable doubt" but I shall disregard them as they are not ESCAR cases.

He argued that the learned trial judge misdirected himself as regards the standard of proof as at pp. 78 and 79 of the grounds of judgment, he followed s. 182A of the Criminal Procedure Code (hereinafter "the CPC") and not reg. 17 of the ESCAR which states:

17. Court's decision.

The court shall decide on the guilt or innocence of the accused only at the conclusion of the case for the defence, and it shall decide upon hearing and considering the evidence of both the prosecution and the defence as a whole, having regard to the justice of the case, without regard for the technicalities of the rules of evidence or procedure, or for any defect concerning the charge.

Hasnal Rezua Merican for the second, third, fourth, seventh, eighth, fourteenth, fifteenth and nineteenth appellants, in the course of the second submissions, raised two points. He said that even if this court adopts regs. 13 and 17 of the ESCAR and reverses the decision in *Sihabduin*'s case, the evidence at the defence stage cannot be used. He also referred to reg. 21(3) of the ESCAR on hearsay and said that the prosecution had failed to prove a *prima facie* case. Answering questions from the bench, he submitted that there had been a serious misapplication of the law in the High Court and a retrial is the only answer.

Zainal Ithnin for the fifth, sixth and thirteenth appellants, adopted the submissions of earlier counsel but referred to the extract in the notes of proceedings in the High Court where the then learned Attorney-General had said:

> **Y.B. Attorney-General:**
>
> The prosecution although we have used ESCAR we will as far as possible endeavour to have an open trial without sticking to the stringent provisions of ESCAR.

Learned counsel added that a retrial is the only answer and should this court hold that the trial is a nullity, then all the appellants should be acquitted and discharged.

Mohamed Hanipa Maidin for the ninth, eleventh, sixteenth, seventeenth and eighteenth appellants, in adopting the earlier views, submitted that the issue is whether the appellants got a fair trial. He said that if the ESCAR were used, the burden would be less on the prosecution but the law must be clearly stated and applied. The effect of this, he added, was that the trial was a nullity whether or not it benefits the appellants as art. 5(1) of the Federal Constitution had been breached. He contended that there had been a miscarriage of justice and since a retrial was not practical, all the appellants should be acquitted and discharged.

Faiz Fadzil for the tenth and twelfth appellants submitted that the ESCAR did not override other laws and s. 2 of the Evidence Act 1950 did not cover it.

The learned Attorney-General submitted that there were substantial differences between the ESCAR and the normal rules of evidence. He explained that at the beginning of the trial, the learned then Attorney-General had told the learned trial judge that the prosecution was using the ESCAR for the venue of the trial on security grounds but was avoiding applying the stringent rules under the ESCAR.

He added that the ESCAR was very much in favour of the prosecution and that going halfway was all right as the appellants were not prejudiced. In fact, he said, there were never any complaints from any of the defence counsel. Could they now object, he asked, since the prosecution had chosen to take the heavier burden.

When questioned by the presiding judge what happens when a decision is made halfway that satisfies the ESCAR but not the normal rules of procedure, the learned Attorney-General said the ESCAR would have to be followed and agreed with the presiding judge that the prosecution cannot actually opt out of the ESCAR the way they did.

In reply Karpal Singh submitted, and this reply was adopted by all other learned defence counsel, that the question of prejudice did not arise. He said that under the ESCAR the Court of Appeal is bypassed for appeals whereas under the normal rules of procedure, any appeal would have to go to the Court of Appeal first. He added that the entire trial is a nullity and expediency must be put aside. He submitted that the question of a retrial does not arise if there had been no trial. He said that the learned trial judge had misdirected himself by calling the defence under the CPC and not under the ESCAR. Any decision by this court, he said, would also affect those who had pleaded guilty.

Although the ESCAR was not used despite the certificate presented at the outset, it is my view that the appellants had not been prejudiced by the stance of the prosecution team in resorting to the normal rules of procedure and evidence. If at all, this concession is more to the advantage of the appellants. Since the trial proceeded on an ESCAR certificate, my finding is that the appeal would be direct to this court.

To my mind, reg. 13 of the ESCAR is crystal clear. When the case for the prosecution is closed, the court shall call on the accused to enter on his defence. The language is plain and simple. There is no mention of the standard of proof. Its effect is made clearer when reg. 17 is read in that the decision on the guilt or innocence of the accused can be made only after hearing both the prosecution and the defence.

In *Sihabduin*'s case, Suffian LP originally sat only with Wan Sulaiman and Syed Othman FJJ as he said:

> This point was first argued before three of us, on July 3, 1979, when we reserved judgment. In the course of considering our draft judgment, we decided that it would be desirable to have a point of law of such importance as this re-argued before five judges; and accordingly it was re-argued on June 23, 1980, in the presence of two additional members of the court, namely our brothers Raja Azlan Shah, CJ Malaya, and Lee Hun Hoe, CJ Borneo.

The learned Lord President must have found the necessity to have the two additional judges because of the two unreported judgments of the High Court before that which agreed with the dissenting view. He had referred to them at p. 275 of the report where it is stated:

> First, there is a decision of Harun J on October 26, 1976, in *Public Prosecutor v. Chea Soon Hoong alias Foo Soh Loh (Federal Territory Criminal Trial No. 23 of 1976)* unreported, in which he appears to have said that at the end of the prosecution case, the court must call on the accused to enter on his defence, regardless. He said:
>
> > There are two main, ingredients to prove a charge under section 57 of the Internal Security Act, *viz:*
> >
> > (i) the offence was committed in a security area without lawful excuse; and
> >
> > (ii) the Accused had under his control the firearm or ammunition without lawful authority.
> >
> > By virtue of Regulation 17 of the Essential (Security Cases) Regulations, I must accept the evidence of the prosecution as to the facts of the case at this stage. This covers the second ingredient.
>
> The second case is a decision of Azmi J on January 28, 1977, in *Public Prosecutor v. Yap Seng Keat Federal Territory Criminal Trial No. 49 of 1976* also unreported, in which he also appears to have said the same thing as Harun J. He said:
>
> > The main encroachment into the ordinary practice of criminal law made by these Regulations is that, it is not necessary for the prosecution to prove their case beyond reasonable doubt at the close of their case, and it seems to me that the principle that the defence should not be called merely to clear any doubt in the prosecution case or to supplement any deficiency in their case does not apply.

If the *Sihabduin* panel had remained with the original three members, then the overall tally with the two High Court judgments would mean that the majority view in *Sihabduin* would be two against the dissenting three. With the additional two members, it now stands as four against three. Disregarding the numbers, I would hold that regs. 13 and 17 of the ESCAR are specific provisions which override the general provision on this point in the CPC. As such, the dissenting judgment in *Sihabduin* appears to be the correct view. In effect, the defence must be called in all cases which had been certified under the ESCAR.

The charge against all the appellants read as follows:

> That all of you from the month of June 2000 until 6 July 2000 at various places in the state of Perak Darul Ridzuan namely:
>
> (a) Post 2, KM 19, Kuala Rhui, Jalanraya Timur Barat, Grik, Hulu Perak;
>
> (b) Batalion 304, Infantri (AW), Kem Grik, Grik, Hulu Perak; and
>
> (c) Bukit Jenalik, Kemajuan Tanah Ngor Sauk, Mukim Cagar Galah, Daerah Kuala Kangsar,
>
> waged war against the Yang di-Pertuan Agong and thereby committed an offence punishable under Section 121 of the Penal Code.

Submissions on the charge focused on the issue of common intention under s. 34 of the Penal Code (hereinafter "the PC") and the particulars therein. As for common intention, it was argued that each appellant faced the charge individually and not together.

Reference was made to *Public Prosecutor v. Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576 where the facts were that a husband and wife were jointly charged as the first and second accused respectively for trafficking in 3455.51 grams of cannabis in various parts of the house they stayed in with their children. A third person found in the house became a prosecution witness.

It was held by the High Court, among other things, that where two or more persons are jointly charged pursuant to s. 170 of the CPC, the prosecution need not show a common intention but must establish the guilt of each accused as a separate exercise, and each may be convicted independently. Conversely, in cases of common intention, the prosecution need only establish that one of the accused committed the act and that the others participated in it in furtherance of a common intention.

In *Muhamad Safarudin Baba & Anor v. Public Prosecutor* [2002] 4 CLJ 210, the two appellants had been arrested with a box containing 1031.9 grams of cannabis which was held by the second appellant. The trial judge called for the defence of the first appellant after applying the presumption of common intention under s. 34 of the PC and for the defence of the second appellant upon invoking the statutory presumption under s. 37(d) of the Dangerous Drugs Act 1952 (hereinafter "the DDA"). Both were found guilty and sentenced to death.

On appeal, the Court of Appeal held that the trial judge had misdirected himself when he convicted the second appellant on trafficking and common intention. The second appellant was not found in actual possession of such drugs. He was only deemed to have been in possession and deemed to have known the nature of such drugs which arose from the finding that the box containing the said drugs was within the custody or under his control. The statutory presumption under s. 37(da) of the DDA applies only to actual possession. Thus, by convicting him for trafficking, the trial judge had erred by indirectly using the presumption of trafficking under s. 37(d) of the DDA to invoke the presumption of trafficking under s. 37(da). Therefore, the second appellant could have only been convicted of an offence under s. 6 of the DDA for possession of such drugs and punishable under s. 39A(2) thereof.

It also held that common intention within the meaning of s. 34 of the PC implies a pre-arranged plan and to convict an accused person of an offence applying the section involves proving that the criminal act was done in concert pursuant to the pre-arranged plan. It would be difficult, if not impossible, to procure direct evidence to prove intention; likewise a prior concerted plan. In most cases, it has to be inferred from the acts or conduct of the parties or other relevant circumstances of the case. Although the conduct of the first appellant during the relevant period and his awareness that the second appellant was carrying the box might be relevant factors in considering the element of common intention, but the knowledge presumed by s. 37(d) of the DDA upon the second appellant ought not to have been imputed to the first appellant because he did not have the custody or control of the box. These factors, in themselves, at post raise the suspicion that the first appellant was involved but suspicion, regardless of its degree, is not evidence.

As for common intention, p. 103 of *Ratanlal and Dhirajlal's* Law of Crimes 25th edn states:

> This section is restricted to common intention and does not embrace any knowledge. It does not require proof that any particular accused was responsible for the commission of the actual offence. It is not restricted to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them. It can well be applied to cases in which offence is committed by only one or two or three persons who all had a common intention. This section applies when a criminal act is done by several persons, in furtherance of the common intention of all. In such a case, the other offenders are liable for that act in the same manner as the principal offender, as if the act were done by such offenders also. This section does not whittle down or do away, with the liability of the principal offender, committing the principal act and merely provides that all other offenders are also vicariously liable.

> The common intention must be to commit the particular offence. The common intention of one must not only be known to the other but must also be shared by him. This section refers to cases in which several persons both intend to do and do an act. It does not refer to cases where several persons intend to do an act and some one or more of them do an entirely different act.

As to the common intention is not reflected in the charge against the appellants, p. 126 of the same textbook provides that s. 34 can be applied even though no charge is framed if the evidence on record establishes it. In such a situation, the absence of charge, by itself, cannot be said to be fatal, and before a conviction can be set aside, it must be shown that the absence of charge had caused prejudice to the accused. I hold that, in these circumstances, it has not.

Much has been said about the lack of particulars in the charge as certain other preparatory acts to the waging of war which came out in the evidence had not been included. These would be the bombing of the Guinness brewery in Petaling Jaya, the Carlsberg brewery in Shah Alam, the Hindu temple in Batu Caves and the attack on the electricity cable tower and installations belonging to the Tenaga Nasional Berhad at Lata Kekabu in Lenggong, Perak. My view, based on text authorities and decided cases, is that these particulars should have been included in the charge but the failure to do so does not render the charge defective. Even if it does, reg. 17 of the ESCAR covers the situation. Hence, this argument lacks merit.

In conclusion, I agree with the findings of my learned brother Steve Shim Lip Kiong CJ (Sabah and Sarawak) except that on the issue of regs. 13 and 17 of the ESCAR, my view is that the dissenting judgment, and not the majority decision, in *Sihabduin*'s case is correct. The defence would have to be called in any case.

Accordingly, the appeals are dismissed except that the cross appeal against the tenth appellant is allowed and the sentence of life imprisonment imposed on him is substituted for the sentence of death.

Siti Norma Yaakob FCJ:

I associate myself with the reasons given in the separate judgments of my brother judges in upholding the convictions of all the nineteen appellants before us. However I need to mention that on the issue of regs. 13 and 17 of the Essential (Security Cases) Regulations 1975, I agree with my brother, Abdul Malek Ahmad FCJ, that in view of the clear and unambiguous provisions of the two regulations, the dissenting judgment in *Public Prosecutor v. Sihabduin bin Haji Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82 must prevail.

I will now consider the appeals on sentence.

The 1st appellant (Mohd. Amin bin Mohd. Razali) who had originally filed a notice of appeal against both his conviction and sentence was content to drop his appeal against his conviction and confined his submission solely against the sentence of death imposed by the court below.

Besides the 1st appellant, the 2nd and 3rd appellants (Zahit bin Muslim and Jamaludin bin Darus) are also sentenced to death and they are also appealing against their sentences. Appeals have also been lodged by the 4th to 19th appellants against their sentences of life imprisonment which under s. 130A(b) of the Penal Code mean imprisonment for the duration of their natural lives.

A conviction under s. 121 of the Penal Code carries with it two penalties in the alternative, death or life imprisonment, and a third sentence that if the death penalty is not pronounced, a convicted person shall also be liable to a fine. The judge in the court below dealt only with the sentences in the alternative and this should be rightfully so considering the nature of the offence that has been committed and the extent of the participation of each of the nineteen appellants in waging war against the Yang di-Pertuan Agong.

There is also a cross appeal by the public prosecutor pressing for the death penalty against the 4th to the 19th appellants. In view of this cross appeal and the appeals of the 1st to the 3rd appellants against their sentences of death, it is only right and proper that I have to consider whether the death penalty is excessive insofar as the 1st to the 3rd appellants are concerned and inadequate as regards the sentences of life imprisonment handed to the 4th to the 19th appellants.

Relevance to the adequacy or inadequacy of the sentences imposed on each of the nineteen appellants must naturally lead to the consideration of the roles played by each of them when they, together with ten other members of the Al-Maunah group, who had already pleaded guilty to an alternative charge, gathered at their base camp at Bukit Jenalik between 29 June 2000 to 6 July 2000, to put into motion the intention they had harboured to wage war against the Yang di-Pertuan Agong and the legitimate Government of the day.

Encik Karpal Singh, learned counsel for the 1st appellant has reminded us that in the history of criminal jurisprudence in this country, this is the first time that a conviction under s. 121 of the Penal Code has been recorded.

For that very reason and coupled by the fact that a conviction under s. 121 carries with it an alternative punishment as well, the ends of justice will be served if a sentence of life imprisonment be substituted for the death sentence. He further stressed that the maximum sentence of death be imposed only in the rarest of rare cases of which this is not.

It is not disputed that the 1st appellant was the mastermind of the tragedy that had befallen upon him. As the President of the Al-Maunah group and the Khalifah Mujahuddin Malaysia, he was the leader of the group of twenty eight men who had gathered at Bukit Jenalik and organized the planned operations to wage war against the Yang di-Pertuan Agong. His preparatory actions include the following:

(1) instructing PW1 a Lance Corporal at Camp Desa Pahlawan, Kota Baru and a former member of the Al-Maunah group to purchase 28 pairs of camouflaged army uniforms. He provided RM2,900 to PW1 to purchase uniforms from PW2 and PW3, two brothers who specialize in accepting orders from uniformed personnel for the making of such uniforms. He later distributed the uniforms to members of the group and all the twenty that were involved in the arms heist were dressed in those uniforms.

(2) inquiring from PW6, a villager at Kampong Kati, Kuala Kangsar about the availability of rented premises in the area. PW6 took him to PW7, from whom the 1st appellant rented a house in June 2000 on payment of RM300 to PW7, as advance rental for three months. It was at this house that the Al-Maunah group repainted the three stolen Pajero vehicles with that shade of green which is associated to military vehicles, equipped them with false military number plates and subsequently used them to transport the various arms seized at the two army camps to Bukit Jenalik.

(3) purchasing 87 pieces of swords, the "parang kembar" from PW14, a handicraft seller at the Central Market, Kuala Lumpur between March to June, 2000. Each sword cost him RM370 and he paid PW14, RM32,190 in cash and cheque and these transactions were recorded by PW14 in his diary, P9. There is also evidence to show that the swords made their way to Bukit Jenalik as members of the Al-Maunah group were seen armed with them. The swords were reputed to have magical powers and they were seen later placed in front of the trenches built around the hill surrounding Bukit Jenalik to prevent the security forces from entering the camp.

(4) staging the two arms heist and seizing the various army weapons and army equipments at Post 2, Kuala Rhui and at Battalion 304, Kem Sik. The 1st appellant led nineteen other members of his group in the three Pajero vehicles to the two army camps in the early hours of 2 July 2000. Before proceeding to the army camps they made a stop at an all-night food stall

very close to Kem 304. According to PW10, the waitress at the stall, three Pajero vehicles arrived at the stall at 2.30am and twenty men in camouflaged uniforms came out from the vehicles. She recognised the 1st appellant as the person who ordered the food and drinks for all twenty of them.

It was following this very early breakfast that all twenty members of the Al-Maunah group got into the three Pajero vehicles and proceeded to Post 2 Kuala Rhui Camp at 2.50am and then to Kem 304 at 4.15am and staged the two arms heist. The stolen army weapons and other army equipments were later recovered by the security forces at Bukit Jenalik on 6 July 2000 when all twenty nine members including the nineteen appellants surrendered to the police.

Details of the arms heist at the two army camps are clearly set out by the learned judge in his judgment gleaned from the evidence of PW15-PW27, the army personnel that were manning Post 2, and the evidence of PW28, PW29, PW34-PW36, the officers that were on duty at Camp 304 at the material times. In summary I single out the following facts that are of particular interests:

(1) the reason given for the early morning visits was to conduct emergency spot checks of all the ammunitions stored at both camps.

(2) dressed as senior army officers the 1st appellant passed himself as an Army Major whilst the 3rd appellant assumed the role of a Lieutenant Colonel.

(3) impressed by the manner in which the 1st and the 3rd appellants conducted themselves and assured by the presence of the three Pajero vehicles bearing the military registration numbers beginning with the alphabet 'Z', all the military personnel at the two army camps were duped into allowing the group to take possession of all but one of the various army weapons, ammunitions and other army equipments and some even helped the group to carry the weapons into the three Pajeros. The one that was not taken was an Ml6 that was under the bed of one of the guards at Post 2.

It was under those circumstances that the weapons, ammunitions and other army equipments stored at the two army camps found their way to Bukit Jenalik in the early hours of 2 July 2000.

Apart from the preparatory actions that had been spearheaded by the 1st appellant, there are his other actions at Bukit Jenalik which are quite eye openers. Following the arms heist, he had distributed the seized arms to his members for practice purposes. It was following the unusual sounds of firearms that the security forces were alerted and they surrounded and condoned off Bukit

Jenalik and a number of security personnel were deployed to penetrate the Al-Maunah's camp. Two of the police personnel, Sergeant Mohd. Shah bin Ahmad (PW44) and Detective Corporal Sanghadevan, a civilian, Jaafar bin Puteh (Jaafar) and an army personnel, Trooper Matthew, were taken hostages by the Al-Maunah group.

PW44 lived to tell us what happened to him and Sanghadevan during the four days and three nights he was held captive. When the 1st appellant realised that PW44 and Sanghadevan were police personnel he ordered the other members of the group to abuse and torture them. During the day they were made to dig trenches along the sides of Bukit Jenalik and these trenches were to serve as a defence in the event of an attack on the camp. At night they were guarded and tied to a durian tree. It was in one of these trenches that PW44 and Sanghadevan buried Trooper Matthew and they were ordered to do so by the 1st appellant.

Trooper Matthew was apprehended by the 10th appellant (Jemari bin Jusoh) and when the 1st appellant realized the identity of Trooper Matthew, the 1st Appellant tortured him by shooting his leg. Not satisfied with his brutal act, he ordered the 10th appellant to shoot Trooper Matthew in cold blood.

A member of the group, Abu Bakar bin Ismail, was shot by the security forces on the morning of 5 July 2000. In retaliation, the 1st appellant aided by his followers returned fire against the security forces and it was during this cross fire that Sanghadevan was shot dead. PW44 and Jaafar buried him in the same hole where Trooper Matthew was buried a day earlier. Jaafar, the innocent civilian who had wandered into the Al-Maunah camp searching for durians and PW44 were rescued on 6 July 2000, but Jaafar did not live long enough to testify as he died before the trial commenced and his recorded statement, P159, was used in the court below under s. 112 of the Criminal Procedure Code.

The 1st appellant was also responsible for directing his men to bomb certain installations namely Carlsberg Brewery at Shah Alam, the Guinness and Anchor Brewery at Petaling Jaya, and the Hindu Temple at Batu Caves. The bomb caused a power failure at Carlsberg, the shots at Guinness failed to explode and three explosions took place at the Temple. The 1st appellant also fired a shot at the cable tower of Tenaga Nasional Berhad at Lata Kekabu, Lenggong, Perak. Finally there is the evidence that he had used a radio set which he had seized during the arms heist to broadcast the objectives and struggles of the Al-Maunah group. He would have no difficulty operating the radio set as he had worked as a signal operator at Kem 304 before the incident.

It is against this background that we are now asked to consider substituting the 1st appellant's sentence of death to that of life imprisonment. In his judgment, the learned judge has referred to the principles of sentencing, and guided by case law, he had considered the due weight to be given to the penalty of the offence committed, the public interest factor and the mitigating pleas put forward.

I see no reason to disturb the exercise of the judge's discretion as regards sentence. Whilst I appreciate that the 1st appellant is convicted of an offence for which nobody has been convicted before, this trend must be nipped in the bud and public interest demands that in the rarest of such rare cases, life imprisonment would not be an appropriate penalty. On that finding the sentence of death pronounced on the 1st appellant is hereby confirmed.

As the Deputy President of the Al-Maunah group, the 2nd appellant was the second man in command after the 1st appellant. An ex-commando who had served in the Police Force Unit Vat 69, his past experience and training in the use of various firearms to combat the communist insurgency in this country came in very handy and he was charged with training the members of the group as to the use of the various arms seized at the army camps.

Before the arms heist, he had brought the 1st appellant to Ipoh where the 1st appellant ordered six military number plates, three of which were later used on the three Pajero vehicles. On this trip to Ipoh, green paint was also purchased and the 2nd appellant saw members of the group painting the three Pajero vehicles with the green paint at the rented premises in Kampong Kati. He had also accompanied the 1st appellant to purchase the "parang kembar" at the Central Market, Kuala Lumpur.

Armed with an Ml6, he had accompanied the 1st appellant to Lata Kekabu, Lenggong and saw the 1st appellant fire the cable tower of the Tenaga Nasional Berhad so as to cut off the electricity supply throughout the state of Perak.

The 2nd appellant also confirmed that two of the four hostages, Trooper Matthew and Corporal Sanghadevan were killed while they were in their custody. He also saw the 1st appellant using the radio set twice and on both occasions heard him making demands to the military.

As the 1st appellant's right hand man, the 2nd appellant must have known of the former's plans to topple the legitimate government of the day. His deep involvement and his active participation of which I have related had convinced

the learned judge to impose the maximum sentence and I have no reason to disagree on that finding. To that end the sentence of death imposed by the court below is confirmed.

The 3rd appellant (Jamaludin bin Darus) is the self confessed traitor for he was a serving military officer with the Malaysian Armed Forces holding the rank of a Major at the time of the offence. During the arms heist, he assumed the role of a Lieutenant Colonel and in demonstrating his authority he had suffered the guards manning the army camp at Post 2, the indignity of squatting and walking like a duck, hopping like a frog, and doing forward and side rolls as well as sit-ups. With the seized weapons he had taught the other members of the group to use them and as the Chief of the Al-Maunah of the Northern Zone (Khalifah Utara) he was very much in control of the situation at Bukit Jenalik as the 1st appellant's right hand man. It was his acts of betrayal and disloyalty that had convinced the learned judge to prefer the maximum sentence against him. I endorse that finding and confirm the sentence of death imposed on the 3rd appellant.

That leaves me with the sentences of life imprisonment that had been ordered by the learned judge on the 4th to 19th appellants. The lesser punishment had been preferred against them for unlike the 1st to 3rd appellants they did not play any lead roles but as a group their presence at Bukit Jenalik carrying out supporting roles were sufficient to contribute to the furtherance of the objectives of the Al-Maunah group. I can do no better than to highlight their roles.

I begin with the 4th appellant, (Abdul Ghani bin Ali @ Ahmad), a Mechanical Engineer who had worked as a Lecturer on "Machine Building & Maintenance Technology", at the Malaysian French Institute in Bandar Baru Bangi. He became a member of the Al-Maunah in 1999 as he was attracted to the courses of martial art conducted by the group as well as courses in the spiritual aspects of Islam.

He arrived at Bukit Jenalik on 30 June 2000, together with his younger brother, Abdul Halim. He was a passive participant at the two arms heist as he stood by and saw large catchments of arms being loaded into the three Pajero vehicles. It is his contention that it was only after his younger brother was shot dead during the cross fire between the security forces and the group that he realised that he was involved in something more sinister than what he had bargained for.

Taking the 5th appellant, (Che Sabri bin Che Jaafar), the 6th appellant, (Mohd. Ramly bin Mohamood) and the 13th appellant, (Yunus bin Hussin), together, they hail from Kelantan and represented the group members from that State. Before coming to Bukit Jenalik, they were met by the 1st appellant at Sauk, Kuala Kangsar, and he brought them to Bukit Jenalik, where the 6th and 13th appellants were made to cook for the other members of the group.

When all the three appellants saw the large assortment of weapons and became aware that PW44, Sanghadevan and Jaafar were detained against their will and were made to dig trenches around the hill, they decided to escape but were not successful in their attempt.

The 7th appellant, (Suhaimi bin Hasbullah), also hails from Kelantan and he was assigned the task of setting up camps for the group, to erect a structure from woods gathered in the area where cooking could be done and generally to keep the whole area in order. He was threatened by the 1st appellant that he would be shot should he attempt to leave Bukit Jenalik.

Like the 4th appellant, the 8th appellant (Mohd Zaini bin Mohd Zainal), was a passive participant during the two arms heist but was coached into firing one of the weapons that was seized. He saw PW44 and Sanghadevan tied to the durian tree and had also seen them digging trenches around the hill. He also saw the 10th appellant escorting Trooper Matthew to the 1st appellant.

The 9th appellant, (Kamarudin bin Mustafar), like the 7th appellant, set up camp for the group and kept the whole area clean. He was the driver of the second Pajero that proceeded in convoy to the two army camps and upon their return to Bukit Jenalik, the 1st appellant gave him an Ml6 but he denied firing any shot from the gun.

The 10th appellant, (Jemari bin Jusoh), a mechanic, was the infamous member who shot dead Trooper Matthew in cold blood on the instruction of the 1st appellant. His other misdeeds include the following:

(1) spraying the three Pajero vehicles green at the rented premises in Kampong Kati.

(2) participating in the arms heist.

(3) firing a few shots from an M16 after he was taught the use of it by the 3rd appellant.

(4) witnessing the detentions of PW44 and Corporal Sanghadevan and saw them tied to a durian tree.

(5) apprehending Trooper Matthew and bringing him to the 1st appellant and saw the 1st appellant torture Trooper Matthew by firing at the latter's leg.

The 11th appellant, (Mohammed Faudzi bin Hamdan), a storekeeper saw members of the group spraying the three Pajero vehicles with the green paint. He admitted wearing the army uniform that was given to him by the 1st appellant and was one of the twenty who went to the two army camps. He helped to unload the various arms from the three Pajero vehicles and carried them to the camp site. He also noticed the detentions of PW44 and Sanghadevan.

When a member of the group, Abu Dakar bin Ismail, (who had pleaded guilty to the alternative charge), was wounded by the security forces on morning of 5 July 2000, the 11th appellant was given the responsibility of attending and guarding Abu Dakar.

The 12th appellant, (Ibrahim bin Dris), had served in the Armed Forces for twenty years and retired as a Sergeant Major. He has had training in the use of firearms and was adept with M16s. He was a passenger in the second Pajero driven by the 9th appellant and helped to load the various weapons seized into the Pajero. He taught the other members of the group the safety aspects of an Ml6 and was fully aware that the group had held four hostages at the camp site.

As I have already dealt with the 13th appellant, I now proceed to the 14th appellant, (Mohd. Amin bin Othman). He holds a Bachelor's Degree in Science from the National University and had worked as a teacher and for a computer company in Alor Setar. He carried the many boxes of food from the bottom of the hill to the camp site, set up camps and helped to prepare food.

He was one of the nine members who stayed at the camp whilst the other twenty participated in the arms heist and he did see the large assortment of weapons on the morning of 2 July 2000.

He was not prepared to describe himself as a guard at the camp but all the same he was aware that two police personnel had been held hostages by the group and was also aware that a member of the group had shot dead Trooper Matthew.

The 15th appellant, (Idris bin Anas), is a Technical Assistant with the Telecoms Department, Malaysia. On arrival at Bukit Jenalik on the evening of 30 June 2000, his first task was to clear the area where they were to set up the living quarters of the group. He was also one of the twenty chosen by the 1st appellant to accompany him to the two army camps and was a passenger in the Pajero driven by the 9th appellant.

He saw the trenches dug by PW44 and Sanghadevan and was aware that Trooper Matthew was shot a day before Sanghadevan suffered the same fate.

The 16th appellant, (Ahmad Sarkawi bin Sulong), a mechanic, was not in the group of twenty that was involved in the arms heist, but he saw the large assortment of weapons brought back by the group on the morning of 2 July 2000.

He was tasked with the responsibility of preventing any infilteration into the camp from outside and it was in the course of carrying out his duties that he apprehended PW44 and Sanghadevan and brought them to the 1st appellant. He was then armed with an Ml6. He was also with the 1st appellant when Jaafar was apprehended.

The 17th appellant, (Zainal bin Mohd. Jailani), stayed back at the camp on the night of the arms heist but helped in unloading the large assortment of weapons from the three Pajero vehicles. He saw Sanghadevan digging the trenches and he learnt later that he was shot dead as did Trooper Matthew.

Nasruddin bin Mohd Jailani, the 18th appellant, is the elder brother of the 17th appellant. Like his younger brother he was not involved in the arms heist but saw the large collection of weapons brought back by the group and saw the 1st appellant firing one of them.

On the night of 3 July 2000, he had tried with the 16th appellant to leave Bukit Jenalik but was unsuccessful when the 16th appellant accidentally tripped on a trick flair and the area was lighted up and at the same time a shot was fired in their direction.

Finally I come to the 19th appellant, (Mohd. Bukhari bin Ismail), a graduate of Al-Azhar University in Egypt with a B.A. Honours degree in Islamic Studies. He worked as a clerk for the Al-Maunah and was responsible for maintaining its accounts and collecting fees from the members.

Like most of the group, he arrived at Bukit Jenalik on the evening of 30 June 2000, and he started putting up a camp and on the next day helped the other members to clean up the area.

He was not a convincing witness as all he was prepared to say was that he only saw the 1st appellant armed with a weapon, noticed two hostages and perceived the presence of three trenches. It is no wonder that the learned judge did not believe him.

The learned judge has rightly considered the less than dominant roles played by the 4th to the 19th appellants and except for one I can find no reason to disturb the sentences imposed on them. The exception is the 10th appellant who showed no qualms about shooting Trooper Matthew in cold blood when ordered to do so by the 1st appellant. It is this one act of brutal violence that singles him out as demonstrating the extent to which he was capable of doing so as to meet the illegal objective of the Al-Maunah.

I agree with the other reasons given by my learned brother, Steve Shim Lip Kiong CJ (Sabah and Sarawak), that the sentence of life imprisonment handed to the 10th appellant to be inadequate and I substitute this with the sentence of death.

On the whole the appeals by the 1st, 2nd and 3rd appellants against their sentences of death are dismissed. The appeals of the public prosecutor against the sentences of the 4th to the 9th appellants, the 11th to the 19th appellants are also dismissed and their sentences of life imprisonment are confirmed. However the appeal of the public prosecutor against the sentence of the 10th appellant is allowed and the death penalty is substituted for the sentence of life imprisonment.

Haidar Mohd Noor FCJ:

I have read the judgments of the learned Chief Judge, Sabah and Sarawak as well as that of Abdul Malek Ahmad FCJ, and Siti Norma Yaakob FCJ. I agree with them except that I would like to express my own views in respect of the application of reg. 13 of the Essential (Security Cases) Regulations 1975 (ESCAR). Regulation 13 reads:

> Procedure after conclusion of case for prosecution. When the case for the prosecution is closed, the court shall call on the accused to enter on his defence.

It is clear, in my view, that in respect of security cases under ESCAR the burden of proof imposed on the prosecution is a departure from the ordinary criminal cases provided by s. 182A of the Criminal Procedure Code. Section 182A reads:

182A (1) At the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) ...

(3) ...

The learned judge in the court below rightly ruled that he was bound by the majority decision of the Federal Court in *Public Prosecutor v. Sihabduin bin Haji Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82 which held that in a security case at the end of the prosecution case the court is not abliged to call on the accused to enter on his defence unless the prosecution has then proved a *prima facie* case against him. Likewise, the learned Chief Judge, Sabah and Sarawak after reviewing *Public Prosecutor v. Sihabduin, Public Prosecutor v. Nordin bin Johan & Anor* [1983] 2 CLJ 22; [1983] CLJ (Rep) 345 and *Md. Desa bin Hashim v. Public Prosecutor* [1995] 4 CLJ 677 opined:

> On a careful consideration of the authorities cited, I find no good reason to depart from the majority view expressed in *Public Prosecutor v. Sihabduin.*

In other words, the *prima facie* case applies to case under ESCAR in spite of the wordings of reg. 13 of ESCAR.

We were asked to depart from the majority decision in *Sihabduin v. Public Prosecutor*. Abdul Malek Ahmad, FCJ in his judgment after considering the relevant authorities and for the reason stated therein took the view that regs. 13 and 17 of ESCAR are specific provisions which override the general provision on the *prima facie* case in the Criminal Procedure Code and preferred the dissenting judgment in *Sihabduin v. Public Prosecutor*. Likewise, Siti Norma Yaakob FCJ, took the same view in preferring to adopt the dissenting judgment of Wan Suleiman FCJ, in *Public Prosecutor v. Sihabduin bin Haji Salleh & Anor:*

> Can there be more manifest indication of the intention of Parliament to modify, in favour of the prosecution, the pre-existing state of criminal procedure in cases coming within the regulations?
>
> The words of Lord Diplock in an authority cited by my Lord President, *Duport Steels Ltd. v. Sir* [1980] 1 All ER 529 seem to me to be particularly apt, for "the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral."

I would respectfully agree with the views of Abdul Malek Ahmad FCJ and Siti Norma Yaakob FCJ.

As for the subsitution of the sentence of life imprisonment in respect of the 10th appellant to one of sentence of death by the learned Chief Judge, Sabah Sarawak, I agree with it for the reasons stated by the learned Chief Judge, Sabah and Sarawak. I agree that the appeals by the 1st, 2nd and 3rd appellants against their sentences of death be dismissed and the appeals by the public prosecutor against the sentence of life imprisonment in respect of the 4th to the 9th appellants and the 11th to 19th appellants be dismissed also.